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Legend

Taxpayer =

City =

State =

Enabling Act =

Secretary =

Department =

Identified Organizations =

X =

Dear :

This is in reply to the Taxpayer's request for a private letter ruling regarding whether six commissioners of the Taxpayer are its employees for federal tax purposes, including whether payments to the six commissioners are reportable on Forms W-2, *Wage and Tax Statement*.¹ To answer your request you asked us whether the six commissioners will receive their mandatory payments as (1) mere agents who collect reimbursement on behalf of their non-federal Identified Organizations, (2) taxable wage income, or (3) personal income as independent contractors.

FACTS

¹ The Enabling Act refers to these six individuals as members. However, we refer to them as commissioners in accordance with local custom, tradition, and practice.

The Taxpayer is an independent federal agency with a main office in City, State. The Taxpayer was established by Congress and receives annual appropriation from Congress. It was established by the Enabling Act to provide critical utilities, infrastructure, and economic development and training in State through partnerships with tribal, federal, state, and local governments and with private organizations in State. The Taxpayer makes federal grants to build public facilities in rural State. These grants are made to state governments, local governments, and tribal governments in accordance with a work plan detailing the year's anticipated funding priorities and recommendations. Over the past thirteen years, Congress has appropriated over \$1 billion to the Taxpayer for its mission.

The Enabling Act establishing the Taxpayer provides for a seven-member panel consisting of an agency head and six commissioners. The Secretary appoints all seven members of the panel. The agency head, who is nominated by Congress and appointed to a four-year term, is a full time employee of the Department. The agency head governs the Taxpayer, supervising its day-to-day operations, the development of the work plan and implementation of specific projects. The agency head also has the power to appoint the Taxpayer's fulltime staff, including program managers and program specialists.

The Enabling Act names the leaders of six public and private organizations across State (Identified Organizations) as the persons to fill the six commissioner positions. Alternatively, the Secretary may appoint an individual selected from nominations submitted by the head of each of these Identified Organizations. In practice, commissioners serving on the panel of the Taxpayer have been such substitutes from the Identified Organizations. However, it is the Secretary who actually appoints an individual to be a commissioner on the panel.

The commissioners are appointed for the life of the Taxpayer, though they may resign from their post without penalty, and, although the Enabling Act does not state so explicitly, the Taxpayer has represented that the commissioners can be removed at the discretion of the Secretary.

The commissioners have primary responsibility for determining how the Taxpayer exercises its authority through their role in the development of the work plan, in implementing specific programs, and as a body engaging in active decision making throughout the year. Upon appointment, commissioners meet with the Taxpayer's lawyer, who is an employee of another federal agency and the designated ethics official of the Taxpayer, to cover topics ranging from ethical issues to conflict of interest matters that the commissioners may encounter in performing their duties for the Taxpayer. As part of this process, commissioners are required to file a financial disclosure report to ensure potential conflicts of interest between performance of their duties for the Taxpayer and their private financial interests and affiliations are avoided.

Commissioners are also briefed by Taxpayer staff in order to become informed of the major program initiatives being undertaken by the Taxpayer.

Each commissioner is appointed by the agency head to join one or more of five “advisory committees.” The advisory committees each focus on a program area, including transportation, health, training, energy, and economic development. The advisory committees are charged with advising the Taxpayer in their respective areas on the needs in State, coordination considerations with partners and stakeholders, project recommendations, and facilitating the Taxpayer’s work on certain projects. In addition to the commissioners, the advisory committees are composed of field experts who have been selected to participate, and who serve as unpaid volunteers.

In addition to serving on the advisory committees, the commissioners are required to attend two formal meetings called by the agency head each year to develop and monitor the annual work plan. The agency head is permitted to and does call other meetings to conduct business as needed, such as for voting on whether to allocate funding to a specific project. The meetings may be held in person or by other means such as teleconference, as determined by the agency head. There are no penalties for failure to attend a meeting. However, only commissioners in attendance are permitted to vote, and commissioners cannot send a substitute to vote on their behalf. The agency head is vested with the authority to break any tie in the commissioner’s votes. Meetings are open to the public. The commissioners are held out to the public as representing and acting on behalf of the Taxpayer at these meetings, as well as in their roles on advisory committees and in conducting other Taxpayer business.

The work plan and the funding priorities it details is subject to review and approval by the agency head and the Secretary. The commissioners are required to submit the work plan they develop to the agency head, who may approve, disapprove, or recommend revisions to the work plan. The work plan is then submitted to the Secretary whose approval authorizes the Taxpayer to enter contracts and obligate federal funds toward specific projects. In addition to advisory committee recommendations, the commissioners draw upon comments from individuals, organizations, partners, and staff to guide their development of the work plan and funding decisions. The group as a whole considers each grant application and votes its approval at a public hearing. Prior to the vote, the group hears presentations, takes public testimony, and deliberates.

The Enabling Act requires the commissioners to be compensated at a given daily rate for time spent engaged in performing services related to the Taxpayer’s business. However, any commissioner who is an officer or employee of the federal government will not be paid any additional compensation. The agency head has authority to determine what constitutes the performance of duties of the Taxpayer. Many of the commissioners wish to waive these payments. Nevertheless, the X ruled that there is no authority for waiver of these payments under the Enabling Act.

The Enabling Act also provides that commissioners are reimbursed for travel expenses, including a per diem, for travel related to performing duties of the Taxpayer. The commissioners submit the hours they spend working on Taxpayer business to the Taxpayer in order to be compensated for their services. No other benefits are provided to commissioners for their services.

LAW AND ANALYSIS

Issue 1: Do the six commissioners receive their mandatory payments as mere agents of their Identified Organizations?

Section 61 of the Code provides that, except as otherwise provided by law, gross income means all income from whatever source derived, including compensation for services.

Rev. Rul. 56-126, 1956-1 C.B. 56, concludes that a member of Congress who returns a portion of his salary to the United States Treasury must include the full amount of his salary in gross income because, according to a ruling of the Comptroller General, a Congressman's salary is payable at the rate specified by law and must be so paid in full.

The Internal Revenue Service has issued several revenue rulings addressing whether members of religious orders who secure employment outside the order must include in income remuneration received for that employment that they were required by the religious order to turn over to the order. These rulings relied on principal and agency concepts, and thus are applicable here. For example, Rev. Rul. 79-132, 1979-1 C.B. 62, concludes that remuneration received from the Armed Forces by a military chaplain who is a member of a religious order is includible in his income even if the order requires him to serve in the Armed Forces and turn over the remuneration to the order. The rationale for the conclusion is that the vow of poverty itself does not create an agency relationship; rather, an agency relationship is established when it appears, based on all the facts and circumstances, that the payor of the income is looking directly to the order, rather than to the individual member, for the performance of services. In addition, the ruling states a religious order is not engaged in the performance of services as a principal where the legal relationship of employer and employee exists between the member and the third party for the performance of the services. Thus, the revenue ruling determined that the direct relationship between the Armed Forces and the individual chaplain establishes a legal relationship of employer and employee with respect to the chaplain's performance of services so that the services performed by the chaplain are not considered the exercise of duties required by the order. See *also* Rev. Rul. 76-323, 1976-2 C.B. 18 and Rev. Rul. 84-13, 1984-1 C.B. 21.

Although the commissioners are members of the Taxpayer by virtue of their Identified Organizations and represent the views of those organizations, the Enabling Act and

duties of the commissioners make it clear that the commissioners are not performing services for the Taxpayer as an agent of those organizations. Rather, the Taxpayer is looking to the individual commissioner to perform the services, not the Identified Organization. For example, the Secretary appoints the commissioners and has the authority to refuse to appoint individuals nominated by the chief executive of an Identified Organization. In addition, the Secretary can remove the commissioners at will. In addition, only commissioners can vote and they cannot send a substitute to vote on their behalf. Furthermore, the commissioners are held out to the public as representing and acting on behalf of the Taxpayer, not their Identified Organizations. Moreover, as discussed below, the commissioners are employees of the Taxpayer. In addition, the X ruled that the commissioner's salaries must be paid in full as specified by law, and cannot be waived. Therefore, the mandatory payments the commissioners receive are includible in their individual gross income under § 61.

Issues 2 and 3: Are the commissioners independent contractors or employees?

Section 3121(d)(2) of the Code defines "employee" as any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

The question of whether an individual is an employee under the common law rules or an independent contractor is one of fact to be determined upon application of the law and regulations to the facts and circumstances in a particular case. Guidance for determining that status is found in two substantially similar sections of the applicable Employment Tax Regulations: section 31.3121(d)-1 relating to the Federal Insurance Contributions Act (FICA), and section 31.3401(c)-1 relating to Federal income tax withholding.

Section 31.3121(d)-1(c)(2) provides that, generally, the relationship of employer-employee exists when the person for whom the services are performed has the right to direct and control the individual who performs the services not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he or she has the right to do so. Similar language is provided in § 31.3401(c)-1(b) of the regulations.

Section 31.3121(d)-1(a)(3) provides that if the relationship of an employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, it is of no consequence that the employee is designated as partner, co-adventurer, agent, or independent contractor or the like. Similar language is provided in § 31.3401(c)-1(e) of the regulations.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or autonomy must be considered. In doing so, one must examine the relationship of the worker and the business. Relevant facts generally fall into three categories: (1) behavioral controls, (2) financial controls, and (3) the relationship of the parties.

Behavioral controls are evidenced by facts which illustrate whether the service recipient has a right to direct or control how the worker performs the specific tasks for which he or she is hired. Facts which illustrate whether there is a right to control how a worker performs a task include the provision of training, the issuance of instruction, or the completion of an evaluation.

Financial controls are evidenced by facts which illustrate whether the service recipient has a right to direct or control the financial aspects of the worker's activities. These factors include the method of payment, the worker's opportunity for profit or loss, and whether a worker has made a significant investment, incurs unreimbursed expenses, or makes services available to the relevant market.

The relationship of the parties is generally evidenced by the parties' agreements and actions with respect to each other, including facts which show not only how they perceive their own relationship but also how they represent their relationship to others. Facts which illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts, the provision of or lack of employee benefits, the right of the parties to terminate the relationship, the permanency of the relationship, and whether the services performed are part of the service recipient's regular business activities.

Several factors support a finding that the Taxpayer exercises behavioral control over the commissioners. The commissioners are subject to the supervision and control of the agency head and Secretary. The primary function of the commissioners is to develop the annual work plan. The commissioners must deliver a report outlining the details of this work plan, and the work plan is subject to review and approval by the agency head and ultimately the Secretary. Commissioners are assigned to advisory committees by the agency head on which they are expected to serve on behalf of the Taxpayer. Additionally, commissioners attend meetings scheduled at the discretion of the agency head. The agency head dictates the time, location, and means by which commissioners fulfill this requirement. Although there are no penalties for failure to attend, commissioners are expected to attend so as to cast their vote on the work plan and other matters pertinent to the Taxpayer. The commissioners must provide the services required of them personally. For example, no one else may attend meetings and vote in place of an individual commissioner. The ability to assign work and to control the means by which the work is done, the right to require attendance at meetings and to provide services personally, supports a finding that the commissioners are employees.

Further, commissioners are instructed in technical, legal, and ethical areas relevant to performing the duties required of them. New commissioners are subject to briefings by Taxpayer staff regarding advisory committees and projects. They are advised by the Taxpayer attorney of ethical requirements and are bound by similar requirements as Taxpayer employees. They are required to provide the Taxpayer a financial disclosure report, because of the responsibilities associated with their positions. Commissioners have continued access to group training and individual advice from Taxpayer employees. The provision of instruction and training also indicates behavioral control which supports a finding of an employment relationship.

Several factors support a finding that the Taxpayer exercises financial control over the commissioners. The Taxpayer provides meeting space, technical support, and other resources necessary for commissioners to perform their duties. The commissioners are paid for the time they spend on Taxpayer business at a daily rate set by a pay schedule. Expenses incurred by the commissioners for travel during Taxpayer business are reimbursed by the Taxpayer, and commissioners do not incur any other out of pocket expenses. These factors indicate an employment relationship. The commissioners do not have any risk of financial loss and do not have the prospect of a profit apart from the daily rate of pay set by statute. Commissioners do not advertise their services to the general public, as would be expected from advisors or consultants who are independent contractors. Thus, the financial control exercised by the Taxpayer indicates an employment relationship.

Finally, an analysis of the relationship of the commissioners and the Taxpayer suggests an employment relationship. Commissioners are represented to others as agents of the Taxpayer. Commissioners represent the agency at public meetings. Commissioners recommend projects and award grants on behalf of the Taxpayer. Further, though commissioners are appointed for the life of the Taxpayer, they may resign without incurring any penalties, and can be removed if the agency head found such action to be appropriate. The expected duration of their services, the commissioner's ability to quit without penalty, as well as the Taxpayer's authority to terminate their services are factors indicating an employment relationship. Although the commissioners are not provided employee benefits in addition to payment for their services, a factor that could indicate non-employee status, we do not find the absence of employee benefits to be determinative in light of the other factors present. The relationship of the parties suggests the commissioners are employees. Thus, we conclude that the six commissioners are employees of the Taxpayer for federal tax purposes including FICA tax and Federal income tax withholding.

CONCLUSION

In accordance with the facts represented and information submitted, we conclude that the six commissioners are employees of the Taxpayer for federal tax purposes including

FICA tax and Federal income tax withholding, and that the Taxpayer must report the commissioners' compensation as taxable wage income on Forms W-2.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Sincerely,

Michael J. Montemurro
Chief, Branch 4
Office of Associate Chief Counsel
(Income Tax & Accounting)